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No. 02-1173

IN THE

Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,
Petitioner,

v.

SEAN GREENE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, the Southern California Regional Rail Authority (hereinafter referred to as "*Amicus*" or "SCRRA") respectfully submits this brief in support of the Petitioner.[1] This brief is submitted with the consent of the attorneys for both the Petitioner and the Respondent. Letters from counsel for both Petitioner and Respondent stating their consent to participation of *Amicus* have been filed with the Clerk.

[1] Pursuant to Rule 37.6, counsel for Amicus states that no other party contributed to the authorship of this brief or made a monetary contribution to its preparation or submission.

DECISION BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Greene v. Long Island R. Co.*, is reported at 280 F.3d 224 (2nd Cir. 2002).

INTEREST OF THE *AMICUS CURIAE*

SCRRA is an independent joint powers agency created pursuant to Cal. Pub. Util. Code § 130255 (2003) for the purpose of planning, designing, constructing and administering the operation of regional rail passenger lines serving the counties of Los Angeles, Orange, Riverside, San Bernardino and Ventura in California. The regional commuter rail system is operated on railroad lines that its member agencies either own outright or have secured the right to use from the freight railroads. The five member agencies are: Los Angeles County Metropolitan Transportation Authority (hereinafter, "LACMTA", which has succeeded to the rights and obligations of the former Los Angeles County Transportation Commission), Orange County Transportation Authority (hereinafter, "OCTA"), Riverside County Transportation Commission (hereinafter, "RCTC"), San Bernardino Associated Governments (hereinafter, "SANBAG"), and Ventura County Transportation Commission (hereinafter, "VCTC").

SCRRA commenced operation in October 1992. As of December 2002, it provided service on seven corridors serving 53 stations and 512 route miles under the trade name "Metrolink." It operates 138 trains each weekday, serving an average daily ridership of approximately 34,000 people. *See* http://www.metrolinktrains.com/about/facts_and_timeline.asp.

Each of SCRRA's member agencies, like Petitioner in this proceeding, is a creature of state statute that has authority to

operate and/or subsidize more than one mode of transit.[2] Each will be adversely impacted by the expansion of the reach of the Federal Employers Liability Act, 45 U.S.C. 51, *et seq.* (2003) ("FELA"), beyond interstate rail operations to wholly *intra-state* operations.

While having some similarity to the circumstances of Petitioner, *Amicus* and its member agencies are different in important respects. The five member agencies of SCRRA each own some interest in rail lines that are used for SCRRA's commuter rail operations and are also used in interstate commerce. *See Southern Pacific Trans. Co.—Abandonment Exemption—Los Angeles Co., CA*, 8 I.C.C. 2d 495 (1992), *reconsideration denied*, 9 I.C.C. 2d 385 (1993); *Orange County Transp. Authority—Exemption—Atchinson, T. & S.F. Ry Co.*, 10 I.C.C.2d 78 (1994); *Ventura County Transp. Comm'n—Acquisition Exemption—Southern Pacific Transp.*, Finance Docket No. 32794, *slip op.* 1995 WL 764468 (I.C.C. 1995). As a result of rights and obligations these agencies acquired along with these lines, the Surface Transportation Board ("STB") and its predecessor the Interstate Commerce Commission ("ICC")[3] have concluded that they are rail carriers providing transportation subject to the STB's jurisdiction under Title 49 U.S.C. Subt. IV (2003).

None of these member agencies operates commuter rail service themselves. SCRRA was created specifically for that purpose. Each operates other modes of transit operations, including bus (LACMTA, OCTA and VCTC operate bus

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[2] Specifically, LACMTA was created pursuant to Cal. Pub. Util. Code § 130050.02 (West 2003), OCTA, RCTC and SANBAG were created pursuant to Cal. Pub. Util. Code § 130050 (West 2003), and VCTC was created pursuant to Cal. Pub. Util. Code § 130050.1 (West 2003).

[3] The ICC was abolished by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (December 29, 1995) and the STB was created to fulfill the remaining functions related to regulation of interstate commerce.

lines; RCTC and SANBAG subsidize bus operations) and/or heavy and light rail operations (LACMTA).[4] Each is represented on SCRRA's eleven member Board of Directors, which according to the Joint Powers Agreement exercises all powers of SCRRA. Each sends a representative to a technical advisory committee, an informally established group that advises SCRRA staff in the implementation of the agency's stated mission. None has any direct connection to the provision of freight service that occurs on the lines each owns. Yet each faces increased exposure to the costs associated with awards to injured employees under FELA if the decision of the court below is allowed to stand and the reach of FELA is allowed to extend beyond employees of interstate railroads.

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[4] Three distinct types of rail-related transit services are provided in the Los Angeles area by SCRRA and its member agencies. The American Public Transportation Association's *2003 Public Transportation Fact Book* (2003) describes the three modes of rail service as follows:

(1) "Commuter rail, which is an electric or diesel propelled railway for urban passenger train service consisting of local short distance travel operating between a central city and adjacent suburbs [SCRRA also provides suburb-to-suburb commuter rail service]. . . . Such rail service, using either locomotive hauled or self propelled railroad passenger cars, is generally characterized by multi-trip tickets, specific station to station fares, railroad employment practices and usually one or two stations in the central business district." *Id.* at 170.

(2) "Heavy rail (metro, subway, . . .) is an electric railway with the capacity for a heavy volume of traffic. It is characterized by high speed and rapid acceleration passenger rail cars operating singly or in multi-car trains on fixed rails; separate rights-of-way from which all other vehicular and foot traffic are excluded. . . ." *Id.*

(3) "Light rail (streetcar, tramway or trolley) is lightweight passenger rail cars operating singly (or in short, usually two-car trains) on fixed rails in right-of-way that is not separated from other traffic for much of the way. . . ." *Id.*

SCRRA's costs not covered by farebox revenues are funded by these five member agencies. To the extent that the decision below extends liability under FELA from the entity that actually operates and dispatches (that is, controls the movement of) freight operations to the five member agencies, the funds available to operate commuter rail service would thereby be diverted to matters other than provision of quality, reliable regional passenger service to the commuting public.

This Court has previously concluded that FELA, like other aspects of the federal scheme of railroad regulation, applies fully to state-owned freight railroads. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197 (1991). *Amicus* takes no position on the issue of whether employees of Petitioner who are involved in the provision of freight service on the Long Island Railroad division of MTA are covered by FELA.[5] However, *Amicus* submits that there is no justification to extend FELA coverage to any affiliate of a state-owned or controlled entity when that other entity and not the affiliate is the one that has some connection to the interstate freight network, especially when the employees of the affiliate are protected by other workers' compensation arrangements.

SUMMARY OF ARGUMENT

In the decision below, the Second Circuit incorrectly extended the reach of one aspect of the federal railroad regulatory scheme to a group of employers and employees that Congress has specifically determined should remain outside the grasp of that system. Congress has correctly con-

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[5] It is not clear whether there are any such employees remaining since LIRR has contracted with a short line railroad, the New York and Atlantic Railway Company, to operate the freight service on the lines of the LIRR. *See New York & Atlantic Railway Company—Operation Exemption—The Long Island Rail Road Company*, Finance Docket No. 33300, *slip. op.*, 1997 WL 7533 (S.T.B. 1997)

cluded that employees whose work primarily affects intrastate transportaion should remain outside the scope of the federal regulation of the rail network. The Second Circuit, however, has impermissibly extended further the reach of FELA.

1. The inclusion of MTA as an employer covered by FELA is inconsistent with the otherwise consistent federal approach to transit systems. The Railroad Retirement Act of 1974, 45 U.S.C. §231 (2003), the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*, (2003) the Railway Labor Act, 45 U.S.C. §151, *et seq.,* (2003) and even the ICC Termination Act of 1995, 49 U.S.C. §§10101 *et seq.*, (2003) all exclude from their coverage electric, interurban railroads that are not connected to the general freight transportation system. FELA also excludes wholly intrastate operations and mandates that an interstate nexus be present before the statute is applicable. The Second Circuit decision expands the scope of FELA to areas that do not have that necessary interstate nexus.

2. a. Exposing public transit agencies to FELA coverage would present an unwarranted and potentially unaffordable drain on the public treasury. Both farebox and local tax revenues fund SCRRA and other similarly situated public agencies that manage transit systems. The potential for uncertain and potentially enormous liability for agencies created and underwritten with the expectation of participation in state workers compensation schemes is not only unwarranted but bears the potential for defeating the ability of these agencies to fulfill their public purposes. Public agency employees cannot argue, as railroad workers could when FELA was first enacted, that they are left without protection. Each state has workers' compensation systems that compensate employees for injuries sustained while on the job.

b. The Second Circuit Decision will undercut the ability of state and local agencies to organize transit systems in a way

that maximizes efficiency and minimizes the public funds necessary to provide all services required to provide this service to the public. Currently, agencies that operate more than one mode of service may consolidate some functions to reduce costs, which is a valuable and proper endeavor for public agencies. The Second Circuit's decision will restrict their willingness to do that.

STATEMENT OF THE CASE

Amicus SCRRA adopts the Statement of the Case that is set forth in the Petition for a Writ of Certiorari.

ARGUMENT

I. THE SECOND CIRCUIT'S EXTENSION OF FELA COVERAGE TO AN ADDITIONAL CATEGORY OF PUBLIC AGENCY EMPLOYERS IS CONTRARY TO THE FEDERAL SYSTEM FOR REGULATION OF RAILROADS AND VIOLATES IMPORTANT PUBLIC POLICY OBJECTIVES.

Amicus SCRRA has carefully structured its operations and its relationships with its member agencies to preserve the distinction between (1) those aspects of the commuter rail operation that have a nexus with, and an impact on, the interstate freight network, and (2) the wholly intrastate transit operations of the member agencies and of SCRRA itself. The Second Circuit's Decision disrupts that structure to the disadvantage of the local governments and that segment of the public that relies on SCRRA's Metrolink service as an alternative to congested highways and as a way to help reduce air pollution in the Los Angeles region.

A. FELA, Like Other Federal Statutes, Only Governs the Operation of Railroads That Have a Nexus to Interstate Commerce.

FELA, by its own terms, is a consistent part of the statutory and regulatory structure that governs the nation's railroads. Until now, its coverage has extended only to those railroads and their employees that were involved in interstate commerce. The decision of the Second Circuit unnecessarily and improperly expands its scope.

The statute applies to:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, ...

45 U.S.C. § 51 (2003). Any such rail carrier "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." *Id.* To ensure that there is no confusion as to who is covered by the statute, Congress emphasized that:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Id.

This arrangement tracks the remainder of the federal railroad regulatory structure, which specifically excludes the entirely local operations of "street, electric and interurban

railways." *E.g.*, Railroad Retirement Act of 1974, 45 U.S.C. § 231(a)(2)(ii) (2003) (excluding from the definition of covered employer "any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power"); Railway Labor Act, 45 U.S.C. § 151, First (2003) (excluding from the definition of covered employer ". . . any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power"); ICC Termination Act of 1995, 49 U.S.C. § 10501(c)(2) (2003) ("Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority"). Indeed, courts reviewing attempts to bring local transit properties within the ambit of FELA's jurisdictional sweep have routinely recognized the statute's limitation on the availability of its remedies. *E.g., Felton v. Southeastern Pa. Transp. Auth.*, 952 F.2d 59 (3rd Cir. 1991).

The instant case presents neither a legal or factual basis nor any public policy reason for expanding the reach of one of these federal statues beyond the clear limitations imposed by Congress. While MTA may be a common carrier, as both the District Court[6] and the Second Circuit have held, not all common carriers are within the reach of FELA. Only those that engage in interstate commerce belong in that category. MTA's status as a common carrier does not mean that FELA must apply.

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[6] *Greene v. Long Island R. R. Co.*, 99 F. Supp. 2d 268, 270 (E.D. N.Y. 2000) (. . . "the court holds, reluctantly, that the MTA is a common carrier within the meaning of the statute").

Nor does the nexus between (1) an arm of MTA over which MTA exercises some managerial supervision, and (2) the interstate freight rail system, compel the result reached by the Court below. The Long Island Railroad decided in 1997 to contract with a short line, freight railroad to provide the freight service over its lines. *See New York & Atlantic Railway Company—Operation Exemption—The Long Island Rail Road Company, supra.* It is critical to note that the contract between the Long Island Railroad and New York & Atlantic Railway Company ("NY&A") grants to NY&A the exclusive right to operate the freight services as well as other freight operations. *Id.*

This contractual relationship further attenuates the connection between MTA management and the actual operation of the interstate service that might otherwise justify bringing MTA's personnel into coverage under FELA. While MTA may have some oversight over the contractual relationship, it cannot accurately be described as "engaging in" interstate commerce.

LIRR's commuter services, which the lower court used as the nexus to bring MTA within the scope of FELA, function wholly within the State of New York. Even if, as the Second Circuit concluded, MTA personnel are directly involved in the essential business aspects of LIRR's commuter rail business operations, 280 F.3d at 239-240, the lower Courts' conclusion that this brings MTA within the ambit of a statute aimed at providing a remedy to workers injured in the course of their duties on an interstate rail carrier does not follow. Because the LIRR is principally a commuter rail carrier and does not provide freight service itself, but has arranged for a short line railroad to provide that service for it, the Second Circuit's decision cannot be correct.

B. Sound Public Policy Militates Against Any Such Judicial Expansion of the Reach of FELA.

The same logic and public policies that have convinced Congress and courts faced with the question of FELA's scope to conclude that FELA should not and does not extend to intrastate transit operations, should drive this Court to now grant certiorari so that it can review the Second Circuit's unwarranted expansion of the statute's reach. MTA, like other transit agencies around the country including *Amicus*, has carefully created an organization that preserves the separateness of the various public transportation modes. MTA has contracted away the operation of the freight service provided on the lines of its component entity, the Long Island Railroad. State workers' compensation statutes cover its employees who are not directly involved in any remaining freight-service related functions of the LIRR. The same can be said about the employees of *Amicus* and its member agencies. *See* Cal. Lab. Code § 3200 *et seq.* (West 2003); *Lenane v. Continental Maritime of San Diego, Inc.* 72 Cal.Rptr.2d 121 (Cal. App. 4th 1998), *rev. denied* (May 20, 1998), *cert. denied* 525 U.S. 1002 (1998) (legal theory supporting workers' compensation benefits as exclusive remedy against employer for injuries sustained in course of employment is a presumed compensation bargain, pursuant to which employer assumes liability without regard to fault in exchange for limitations on amount of liability, and employee is afforded swift and certain benefits without having to prove fault but gives up wider range of damages available in tort.)

Judge Wexler, in the District Court opinion below, before reaching an ultimately incorrect decision about the need to bring MTA within FELA's scope, explained part of the reason why public policy does not support such a decision, stating:

> In a time when other workers, including those involved in far more hazardous situations, are covered by a comprehensive scheme of workers' compensation bene-

> fits, it is archaic and unwarranted for railroad workers to be entitled to a different standard that takes them outside of the realm of the typical employee. Municipal police officers and firefighters are engaged in professions that daily subject them to situations far more dangerous than that of the typical railroad worker. Yet, if these individuals, who put their lives at peril every day, are injured on the job, they are covered by workers compensation benefits.
>
> Each and every railroad worker, on the other hand, from the ticket taker to the administrative office worker, may collect damages under FELA, for an on the job injury. In such cases, the railroad employee is entitled to recover by showing that their injury is attributable to the negligence, however slight, of their employer . . . [citation omitted] While a statutory scheme aimed at protecting railroad workers from the "physical dangers of railroading" may have been necessary in 1908, when FELA was passed, that is no longer the case.

99 F. Supp. 2d at 270.

The second and even more compelling public policy reason for limiting FELA's reach into the treasuries of public agencies that are not involved in interstate freight operations is summarized succinctly in a Comment in St. John's Law Review that discusses the instant case. Jeffrey Amato, Comment, *The MTA, It's Not "Going Your Way"—Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.*, 75 St. John's L.Rev. 113, 132-135 (2001). In short, FELA produces large but unpredictable judgments that simply do not promote railroad safety. Rather, these judgments promote feelings of inequity and hardship among those injured employees who receive no

compensation at all when they are unable to demonstrate that their employer was negligent. According to the author:

> The costs of fault-based compensation systems have been proven . . . and they have failed to promote safety in the railroad industry. . . .
>
> . . . .
>
> The most compelling policy argument against FELA liability is the statute's impact on safety and profitability of railroads. . . . The FELA is seen as the nemesis of railroads, . . . and a huge roadblock in the way of profitability. . . . Most notably, FELA has had a tremendous adverse effect on the railroad safety by discouraging productive communications regarding accident cases, and thereby directly reducing preventative measures. . . . The fact remains that FELA creates a substantial impediment to the management, implementation and administration of general railroad safety programs.

Amato, *supra* at 134-135 (footnotes omitted).

The public treasuries that fund the operations of transit agencies can ill-afford the extra burden associated with a negligence based system, rather than one that provides compensation to workers based on the extent of the injury suffered and the duration of the period that the injury will keep the employee out of the workplace. *Amicus* and its member agencies, like MTA and its component parts, have created an organization that preserves the distinction between and among the services provided. This structure presents a system that allocates risk and cost, as well as statutory and regulatory burdens and compliance, to the constituent part that has the direct nexus with the particular operation, and thus the ability to plan and contract for financial exposure and regulatory oversight. Thus, while the SCRRA member agencies have been ruled to be carriers providing transportation subject to the jurisdiction of the STB under 49 U.S.C. Subt. IV (2003), no member of their respective work forces

has been considered to be covered by FELA because none of them undertakes a direct role in the provision of the freight service that occurs on the lines they own. Like the freight carrier that provides the service on the lines of the Long Island Railroad, the freight railroads that operate on SCRRA's member agency lines are carriers subject to FELA and the remaining aspects of the federal rail regulatory system. Preserving these agencies' coverage under the California workers compensation system has enabled them to plan for and insure against the risk of workplace injury. Bringing any portion of that work force within the scope of FELA could impose the same substantial costs, with the same extreme financial consequences as Amato, *supra*, identified as the source of major financial difficulties for the freight railroads.

The same is true for MTA. *Amicus*, like MTA and other similarly situated commuter agencies, has successfully created a structure that strives for safety of the workers and provides compensation to them when they are injured. The Second Circuit's Decision in the instant case places SCRRA's arrangement, like MTA's and those of other agencies nationwide, at risk. It is contrary to both the law and sound public policy, and should be reviewed by this Court.

CONCLUSION

The decision below marks a legally unfounded and wholly unnecessary expansion of the reach of a federal statute that has already been severely criticized for the financial havoc it creates in the railroad workplace. Congress was quite clear in its direction that this statute applies only to those railroads that are actually engaged in interstate commerce. By reaching to include within the scope of FELA a public agency that owns a subsidiary that owns track on which freight services are provided by another railroad, the Second Circuit has started down a path that Congress did not envision. To prevent this expansion of FELA to other agencies that have a connection with the freight system but do not "engage" in the provision of any aspect of that service themselves, this Court should grant MTA's Petition for a Writ of Certiorari to permit review of the significant and potentially destructive decision below.

Respectfully submitted,

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